

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2010 MSPB 11**

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Docket No. DE-0845-09-0213-I-1

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**Fareheda L. Malone,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

January 12, 2010

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Fareheda L. Malone, Albuquerque, New Mexico, pro se.

Roxann Johnson, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 The appellant petitions for review of the initial decision that affirmed, as modified, a reconsideration decision of the Office of Personnel Management (OPM). For the reasons set forth below, we GRANT the petition for review, AFFIRM the administrative judge's determination that the appellant is not entitled to a waiver of recovery of the overpayment, VACATE the administrative judge's finding that the appellant is not entitled to an adjustment of the recovery schedule based on financial hardship, and REMAND the appeal to the Denver Field Office for further adjudication consistent with this Opinion and Order.

## BACKGROUND

¶2 OPM initially found that the appellant had been overpaid \$35,792 in Federal Employees' Retirement System (FERS) disability annuity benefits from April 1, 2004, through August 30, 2008, caused by her receipt of a retroactive award of Social Security Administration disability insurance benefits for the same period. Initial Appeal File (IAF), Tab 5, Subtab 4 at 1. On reconsideration, OPM affirmed its initial decision and found that the appellant was not entitled to a waiver. IAF, Tab 5, Subtab 2 at 1, 5. On appeal, the administrative judge sustained OPM's reconsideration decision, finding that OPM had proven that there was an overpayment of \$35,792 and that the appellant was not entitled to a waiver based on financial hardship because of the set-aside rule.<sup>1</sup> IAF, Tab 9, Initial Decision (ID) at 7-12. The administrative judge also concluded that the appellant failed to establish by substantial evidence that she was entitled to an adjustment of the recovery schedule based on financial hardship. ID at 17. Nonetheless, the administrative judge reduced the monthly repayment amount from \$100 per month to \$96.97 per month,<sup>2</sup> which the administrative judge found to be the total net amount of the appellant's monthly FERS annuity. ID at 17; IAF, Tab 5, Subtab 2 at 6.

¶3 The appellant has filed a petition for review reiterating her position that repayment would be unconscionable and cause her extreme financial hardship because her current income is below the poverty level. Petition for Review File (PFRF), Tab 1 at 2-3. The appellant submits new evidence with her petition

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<sup>1</sup> OPM policy provides that individuals who know or suspect that they are receiving erroneous payments are expected to set aside the amount overpaid pending recoupment, and that in the absence of exceptional circumstances--which do not include financial hardship--recovery in these cases is not against equity and good conscience. *E.g.*, *Maseuli v. Office of Personnel Management*, [111 M.S.P.R. 439](#), ¶ 8 (2009).

<sup>2</sup> Neither party has challenged this adjustment on review.

showing that her rent increased from \$550 per month to \$810 per month after the administrative judge issued the initial decision. *Id.* at 1, 5. The appellant also challenges the administrative judge's decision to exclude certain expenses in determining her ordinary and necessary living expenses. *Id.* at 2. OPM has responded in opposition to the petition for review. PFRF, Tab 4.

### ANALYSIS

The appellant may be entitled to further adjustment of the recovery schedule.

¶4 On review, the appellant has not challenged the administrative judge's findings regarding the overpayment amount or that she was not entitled to a waiver because of the set-aside rule. *Id.* at 7-12. Thus, we affirm the administrative judge's findings on these issues. Nonetheless, an annuitant who is ineligible for a waiver may be entitled to an adjustment in the recovery schedule if she shows that it would cause her financial hardship to make payment at the rate scheduled. *Maseuli v. Office of Personnel Management*, [111 M.S.P.R. 439](#), ¶ 10 (2009); [5 C.F.R. § 845.301](#). Pursuant to OPM's regulations, financial hardship may exist where the annuitant needs substantially all of her income and liquid assets to meet current ordinary and necessary living expenses and liabilities. *Maseuli*, [111 M.S.P.R. 439](#), ¶ 10; [5 C.F.R. § 845.304](#). The Board has the authority, based on an appellant's financial situation, to order OPM to adjust the monthly repayment schedule. *Gott v. Office of Personnel Management*, [97 M.S.P.R. 538](#), ¶ 10 (2004). Where the Board has found that an appellant has a monthly deficit after expenses, the Board has adjusted the repayment schedule to \$5.00 because of financial hardship even though the appellant was not entitled to a waiver because of the set-aside rule. *See Dorrello v. Office of Personnel Management*, [91 M.S.P.R. 535](#), ¶¶ 8-10 (2002); *Matthews v. Office of Personnel Management*, [85 M.S.P.R. 531](#), ¶ 11 (2000).

¶5 Although the appellant in this case does not specifically request an adjustment in the repayment schedule on review, we construe her argument as

such because she has submitted new and previously unavailable evidence that her rent has substantially increased and, therefore, her financial circumstances have changed since she submitted her October 8, 2008 financial resources questionnaire (FRQ). PFRF, Tab 1 at 1, 5; IAF, Tab 5, Subtab 3. On review, the appellant asserts that “[i]mmmediately prior” to the July 31, 2009 initial decision, she was informed by her former landlord that her lease would be terminated effective August 7, 2009. PFRF, Tab 1 at 1. As a result, she rented a new apartment in August and is now paying an additional \$260 per month in rent. *Id.* Assuming that there has been no other change in her financial condition as determined by the administrative judge, her monthly expenses would now exceed her monthly income by approximately \$93.99 due to this rent increase.<sup>3</sup>

¶6 In its opposition to the appellant’s petition, OPM disputes whether her rent increase was necessary and involuntary. PFRF, Tab 4 at 4. Because OPM made this argument on the day the record closed on review, PFRF, Tab 2 at 1, the appellant had no opportunity to respond, and she did not submit anything in writing from her former landlord to support her claim that the move was involuntary.

¶7 Under [5 C.F.R. § 845.305](#), ordinary and necessary living expenses include rent. Ordinary and necessary expenses, however, should also be reasonable under the circumstances. *See Wagner v. Office of Personnel Management*, [83 M.S.P.R. 355](#), ¶ 11 (1999). The Board gives the appellant the benefit of the doubt unless the expense clearly constitutes an extravagance or a luxury. *See Fearon v. Office of Personnel Management*, [109 M.S.P.R. 606](#), ¶ 6 (2008). Based on the record, however, we are unable to determine on review whether the appellant’s new rent is reasonable or constitutes an extravagance or luxury.

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<sup>3</sup> The administrative judge found that the appellant’s monthly income exceeded her ordinary and necessary monthly expenses by \$166.01, based on her prior rent payment. ID at 14, 16.

¶8 The administrative judge based her finding that the appellant failed to prove that she is entitled to an adjustment of the recovery schedule based on financial hardship, in part, on her finding that \$550 was the ordinary, necessary, and reasonable amount that the appellant spent on rent each month. ID at 14, 16-17. The administrative judge did not err in this respect, because when she issued the initial decision that was still the appellant's monthly rental expense. Nonetheless, the appellant has submitted new evidence on review showing that her monthly rental expense has substantially increased.

¶9 Under the circumstances, we have decided to remand the appeal to allow the appellant an opportunity to present evidence on whether her new rental expense is reasonable and to submit an updated FRQ with supporting documentation. *See Nixon v. Office of Personnel Management*, [52 M.S.P.R. 672](#), 677-678 (1992) (based upon the appellant's submission of new evidence of financial hardship on petition for review, the Board remanded the appeal to allow the appellant to substantiate any questioned expenses and to submit an updated FRQ and supporting documentation to reflect the change in circumstances since the last FRQ was prepared). OPM may also submit any evidence it has to refute the appellant's evidence on remand. The administrative judge can then determine whether the appellant's current rental expense is reasonable and order OPM to adjust the appellant's repayment schedule based on the appellant's current financial situation if necessary.

The administrative judge properly excluded the appellant's expenses incurred in support of her adult children from her determination of the appellant's ordinary and necessary expenses.

¶10 The appellant asserts that the administrative judge unfairly reduced her necessary monthly expenses without regard to her "parental obligation" to her "college-age" children living in her home. PFRF, Tab 1 at 2. The appellant's bare assertion that she is obligated to support her adult children is insufficient to disturb the administrative judge's findings excluding the expenses she incurred

on their behalf from her ordinary and necessary expenses. ID at 14-16. Ordinary and necessary living expenses do not include expenses incurred in supporting a person for whose support the annuitant is not legally responsible. *See Wagner*, [83 M.S.P.R. 355](#), ¶ 11 (citing *Portello v. Office of Personnel Management*, [54 M.S.P.R. 261](#), 268 (1992)); [5 C.F.R. § 845.305](#). The administrative judge made uncontested findings that both children are over 21 years old and the appellant had not listed any dependent children on her federal income tax forms. ID at 14. The appellant has not shown that she is legally responsible for supporting her adult children. On remand, any claimed expenses related to the support of any persons the appellant is not legally responsible to support should not be included among the appellant's ordinary and necessary expenses. *See Portello*, 54 M.S.P.R. at 268.

Speculative estimates of potential future medical expenditures should not be included in the appellant's ordinary and necessary expenses.

¶11 The appellant asserts that the administrative judge erred in determining her ordinary and necessary expenses by failing to allow for “unanticipated expenditures normally incurred” by a person with her disability. PFRF, Tab 1 at 2. She has not, however, identified what these expenses would be or provided any evidence in support of her claim on review. We note that the administrative judge's determination of her “current ordinary and necessary living expenses” under [5 C.F.R. § 845.304](#) included allowances for medical/dental expenses, medical appliances and devices, and unanticipated emergencies. ID at 15-17. The Board has previously held that “the mere possibility of a future medical emergency does not affect the appellant's present ability to pay, and any future effects may be addressed by a mid-collection request to OPM for lower payments, compromise, suspension, or write-off.” *Martin v. Office of Personnel Management*, [49 M.S.P.R. 134](#), 137 (1991), *aff'd*, 960 F.2d 156 (Fed. Cir. 1992) (Table). On remand, the administrative judge may exclude any speculative claimed medical expenses in determining the appellant's current ordinary and

necessary living expenses. *See Martin*, 49 M.S.P.R. at 137; *see also Fearon*, [109 M.S.P.R. 606](#), ¶ 9 n.2 (declining to consider “speculative” anticipated expenses that were not supported by new and material evidence).

ORDER

¶12 Accordingly, we REMAND this appeal to the Denver Field Office for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.